LIBRARY
SUPREME COURT, U. S.

In The

JUL 31 1970
CLERK

Supreme Court of the United States

October Term, 1970

No. 475

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Petitioners,

- against -

THE CITY OF NEW YORK, LINCOLN AMSTERDAM URBAN RENEWAL AGENCY, and THE SUPREME COURT OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI

GENE CRESCENZI
Attorney for Petitioners
415 Lexington Avenue
New York, New York 10017
682-1686

LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. New York, N.Y. Philadelphia, Pa.
(215) 563-5587

TABLE OF CONTENTS

	Page
Petition for Writ of Certiorari	1
Opinions Below	2
Jurisdiction	3
Questions Presented	3
The Facts	3
The Constitutional Provisions Involved	5
Argument:	
Point I. The Court should grant Certiorari to clarify the meaning of Title 28 U.S.C. 1441, The Treaty Clause of the Constitution of the United States, The United Nations Charter, and The Declaration of Human Rights.	6
Point II. Petitioners are entitled to a trial by a Three-Judge Federal Court.	8
Conclusion	10

Contents

Page

Table of Citations

CASES CITED:

Adirondack Railway v. New York State, 176 U.S. 335 9

Com. of Mass. v. Bartlett, D.C. Mass. 1967, 266 F. Supp. 390 . . . . . 2, 8

Oyama v. California, 332 U.S. 633 . . . . 2, 7

The Record of the Association of the Bar of the City of New York, Volume 24, No. 8, page 487, Condemnation Proceedings — A Proposal by The Honorable Aron Steuer Justice, Supreme Court, Appellate Division. 9

STATUTES CITED:

28 U.S.C. 1254(1) 3

28 U.S.C. 1441 . . . . . 2, 4, 6, 9

28 U.S.C. 2283 . . . . . 2, 8

Condemnation Law of the State of New York 2, 4

Declaration of Human Rights 3, 7

Section 4 of the Condemnation Law of the State of New York 4

Contents

	Page
United Nations Charter	7

CONSTITUTION CITED:

Fourteenth Amendment of the Constitution of the United States	5
Article 6, Clause 2 of the Constitution of the United States	2, 5
Article 1, Section 7 of the Constitution of the State of New York	4, 5, 8

APPENDIX

Appendix "A" Copy of Order of the United States District Court for the Southern District of New York	1a
Appendix "B" Copy of Order of the United States Court of Appeals for the Second Circuit	3a

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Petitioners,

vs.

THE CITY OF NEW YORK, LINCOLN AMSTERDAM URBAN RENEWAL AGENCY, and THE SUPREME COURT OF THE STATE OF NEW YORK,

Respondents.

Petition for Writ of Certiorari

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioners, MAX LIBEN, JACK LIBEN, NORMAN LIBEN, and SELMA LEVINE, hereby petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Second Circuit affirming the dismissal of the petitioners' action to remove a condemnation

proceeding of the Lincoln Amsterdam Urban Renewal Agency of the City of New York and the Supreme Court of the State of New York to the United States Court for the Southern District of New York pursuant to Title 28 U.S.C. 1441 thereof, Article 6, Clause 2 of the Constitution of the United States, Com. of Mass. v. Bartlett, D.C. Mass. 1967, 266 F.Supp. 390, and Oyama v. California, 332 U.S. 633, which application was denied by Judge Dudley B. Bonsal, United States District Judge in the Southern District of New York by judgment entered January 23, 1970.

The application also included a motion for a temporary restraining order and preliminary injunction to convene a three-judge court on the grounds of the unconstitutionality of the Condemnation Law of the State of New York pursuant to Title 28 U.S.C. 2283.

Opinions Below

There were no opinions in the decisions of the court below. An order signed by Judge Dudley B. Bonsal and entered on January 23, 1970 dismissed the complaint herein and granted summary judgment to the respondents.

The United States Court of Appeals for the Second Circuit affirmed the lower court decision without opinion by judgment entered on the 7th day of May, 1970. A copy of the Order of the United States District Court for the Southern District is annexed hereto as Appendix "A". Appendix "B" is a copy of the Order of the United States Court of Appeals for the Second Circuit.

Jurisdiction

The order sought to be reviewed herein was made on the 7th day of May, 1970. An order denying an application for a three-judge court for the removal of a condemnation proceeding of the City of New York against the petitioners entered on January 23, 1970 was made. It is believed that the statutory provision which confers jurisdiction on this Court to review the order in question is 28 U.S.C. 1254(1).

Questions Presented

1. Can the City of New York exercise the function of eminent domain in violation of the Declaration of Human Rights to which the United States is pledged by treaty to uphold?

2. Can the City of New York, by applying a law contrary to the Treaty Law of the United States in the Supreme Court of the State of New York, contravene the public policy of the United States?

The Facts

This matter was before the District Court on a motion for a temporary restraining order and preliminary injunction to convene a three-judge court on the grounds of the unconstitutionality of the Condemnation Law of the State of New York.

The petitioners are a partnership which owns real estate, which is the subject of a condemnation proceeding by the respondent, City of New York, and is the object of an Order of Possession

based upon a Writ of Assistance to evict the petitioners on or before the 31st day of January, 1970.

The petitioners are owners of a tire sale and distribution business under a franchise from the Dunlop Tire and Rubber Company. The petitioners stand to lose their franchise if they are required to move from their present location to a location outside of the County of New York. Such loss would cause them irreparable damage. That due to zoning requirements and other rules and regulations of the City of New York, it is virtually impossible for the petitioners to acquire a similar location in the County of New York under the terms of the condemnation.

The petitioners demanded, among other things, that a three judge court be convened on the issue of the unconstitutionality of Article 1, section 7 of the Constitution of the State of New York, and section 4 of the Condemnation Law of the State of New York. They also requested that a condemnation proceeding vesting title of the parcel in the respondent City of New York under Index No. 408811/1967, Supreme Court of the State of New York, County of New York, be reopened upon its merits and be removed to and be litigated in this Court pursuant to Title 28 U.S.C. 1441, in that the petitioners have a constitutional right to rely upon treaties of the United States of America as the supreme law of the land, and to litigate matters arising out of treaties in district courts of the United States of America.

The Constitutional Provisions Involved

Article 6, Clause 2 — Constitution of the United States.

> "All treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Fourteenth Amendment — Constitution of the United States.

> "Or shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 7 — Constitution of the State of New York.

> "(a) Private property shall not be taken for public use without just compensation."

Argument

Point I

THE COURT SHOULD GRANT CERTIORARI TO CLARIFY THE MEANING OF TITLE 28 U.S.C. 1441, THE TREATY CLAUSE OF THE CONSTITUTION OF THE UNITED STATES, THE UNITED NATIONS CHARTER, AND THE DECLARATION OF HUMAN RIGHTS.

The condemnation of the petitioners' real estate was done subsequent to a public hearing in which a Roman Catholic Priest and a Jewish Rabbi invoked the needs of their respective congregations.

The Board of Estimate completely disregarded the rights of the petitioners who occupy the premises consisting of 46,000 square feet of space and have been in operation since 1911 employing twenty-five persons in the operation of their business.

The respondent has likewise acted in bad faith in that contracts for the alleged public purpose of low income housing and middle income housing have not been made. There is a notorious lack of available funds to implement any alleged plans for the alleged public purpose, and there are many precedents whereby the respondent has condemned property and then resold the condemned property for private purposes.

The California Alien Land Laws were struck down as being in violation of the Constitution of the United States.

It is submitted that the condemnation herein is in violation of petitioners' civil and constitutional rights as well as their rights under the Declaration of Human Rights and the United Nations Charter.

See Article 17 of the Declaration of Human Rights:

1. Everyone has the right to own property alone as well as in association with others.

2. No one shall be arbitrarily deprived of his property.

See Oyama v. California, 332 U.S. 633:

"Moreover, this nation has recently pledged itself through the United Nations Charter to promote respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, and religion. The alien Land Law stands as a barrier to the fulfillment of that national pledge. It is inconsistent with the Charter, which has been duly ratified and adopted by the United States and is but one more reason why the statute must be condemned. . . ."

". . . And So, in origin, purpose, administration and effect the alien land Law does violence to the high ideals of the Constitution of the United States and the Charter of the United Nation. It is an unhappy facsimile, a disheartening reminder of the

racial policy pursued by those forces of evil whose destruction recently necessitated a devastating war. It is racism in one of its most malignant forms. Fortunately, the majority of the inhabitants of the United States and the majority of those in California reject the racism and all of its implications. They recognize that under our Constitution all persons are entitled to the equal protection of the laws without regard to their racial ancestry. Human liberty is in too great peril today to warrant ignoring that principle in this case. For that reason, I believe that the penalty of unconstitutionality should be imposed on the alien Land Law."

See also Com. of Mass. v. Bartlett, D.C. Mass. 1967, 266 F.Supp. 390:

"Although the Constitution contains no express provision limiting exercise by the state of its power of eminent domain, like other powers of the state such power is subject to this clause, and the state's exercise of its power must yield when it conflicts with a paramount federal statute."

Point II

PETITIONERS ARE ENTITLED TO A TRIAL BY A THREE-JUDGE FEDERAL COURT.

The constitutionality of Article 1, section 7 of the Constitution of the State of New York is believed to be unconstitutional and, pursuant to Title 28 U.S.C. 2283, there is a statutory re-

quirement of a three-judge federal court as well as federal jurisdiction under Title 28 U.S.C. 1441.

See The Record of the Association of the Bar of the City of New York, Volume 24, No. 8, Page 487, Condemnation Proceedings — A Proposal By The Honorable Aron Steuer Justice, Supreme Court, Appellate Division:

> ". . . Some questions in regard to eminent domain do lend themselves to court decision. Such questions as whether a public purpose is being served, who the person is that is entitled to compensation or whether the property is legally exempt from condemnation are plainly within the proper competence of the courts. But it is equally clear that the issue most often litigated, the amount to be paid, technically called the quantum issue, is not. . . ."

See also Adirondack Railway v. New York State, 176 U.S. 335:

> ". . . It is insisted, however, that the constitutional limitations on the exercise of the power, though conditions merely and not part of the power itself, require that the owner shall have an opportunity to contest the legality of the taking, and that ultimate payment of just compensation must be secured. . . ."

Conclusion

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED AND UPON GRANTING CERTIORARI THE COURT SHOULD REVERSE THE DETERMINATION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Respectfully submited,

GENE CRESCENZI
Attorney for Petitioners

Appendix A

Order Granting Motion for Summary Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Plaintiffs,

-against-

THE CITY OF NEW YORK, LINCOLN AMSTERDAM URBAN RENEWAL AGENCY and THE STATE OF NEW YORK,

Defendants.

---

69 Civil 5457

A motion having been regularly made by the defendants herein for summary judgment in the defendant's favor dismissing the action on the ground that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law.

Now, on considering the memoranda submitted by the respective parties; and after hearing counsel for the respective parties, and due deliberation

having been had, and the decision of the court having been filed, it is

ORDERED, that said motion be and the same hereby is granted, and that judgment be entered herein in favor of all of the defendants dismissing this action in favor of the defendants and against the plaintiffs.

Dated: New York, N.Y.
January 22, 1970

s/ Dudley B. Bonsal
United States District Judge

JUDGMENT ENTERED — 1/23/70

s/ John Livingston
CLERK

Appendix B

Judgment Appealed From

UNITED STATES COURT OF APPEALS

For The

SECOND CIRCUIT

--*--

34608

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of May, one thousand nine hundred and seventy.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,

HON. STERRY R. WATERMAN,
Circuit Judge,

HON. WILLIAM J. JAMESON,
District Judge.

Judgment Appealed From

Max Liben, Jack Liben, Norman Liben, Selma Levine, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Plaintiffs-Appellants,

v.

The City of New York, Lincoln Amsterdam Urban Renewal Agency, The Supreme Court of the State of New York,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellants.

A. DANIEL FUSARO
Clerk

(39857) LIBRARY
SUPREME COURT, U. S.

U.S.
D
AUG 21 1970
CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. 475

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Petitioners.

against

THE CITY OF NEW YORK, LINCOLN-AMSTERDAM URBAN RENEWAL AGENCY, and THE SUPREME COURT OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

J. LEE RANKIN,
Corporation Counsel of the City of New York,
Attorney for Respondent City of New York,
Municipal Building,
New York, New York 10007

STANLEY BUCHSBAUM,
MILTON H. HARRIS,
of Counsel.

TABLE OF CONTENTS

	PAGE
Statement	1
Questions Presented	2
The District Court Action	2
The State Condemnation Proceeding	3
Point I—The issue having been determined by the final decree in the condemnation proceeding in the Supreme Court of the State of New York, petitioners, who failed to appeal therefrom, are estopped from challenging the validity of the appropriation of their property. They are estopped also by receipt of a partial payment of award, which constitutes an acceptance of benefits in the challenged proceeding	6
Point II—The acquisition of the premises is not illegal or arbitrary because petitioners must relocate or discontinue the business enterprise they conducted on the property. The United Nations' Declaration of Human Rights restates the due process requirement of the federal and state constitutions, which was observed in the challenged appropriation	10
Conclusion	13

TABLE OF AUTHORITIES

PAGE

Cases:

Adirondack Railway v. New York State, 176 U. S. 335 (1899) 10

Berman v. Parker, 348 U. S. 26 (1954) 11

Consolidated Freightways v. Railroad Commission of California, 36 F. Supp. 269 (S.D.C., Calif., 1941) 4

Courtesy Sandwich Shop, Inc. v. Port of New York Authority, 12 NY 2d 379 (1963), apl. dism. 375 U. S. 78 (1963), rehear'g den. 375 U. S. 960 (1963) 11

Deerfield Park District v. Progress Development Corp., 26 Ill. 2d 296, 186 N.E. 2d 360, 361 (Sup. Ct., Ill., 1962), *cert. den.* 372 U. S. 968 (1963) 12

Huling v. Kaw Valley Railway and Impr. Co., 130 U. S. 559 (1889) 7

In re Denney v. Fort Recovery Banking Co., 135 F. 2d 184 (7th Cir., 1943, *cert. den.* 320 U. S. 747 (1943), *rehearing den.* 320 U. S. 812 9

In re Lincoln-Amsterdam Urban Renewal Project, N.Y.L.J., May 3, 1967, p. 20, col. 4 (Sup. Ct., N.Y. Co.); N.Y.L.Y., July 2, 1969, p. 12, col. 8; Nov. 7, 1969, p. 15, col. 5; Dec. 15, 1969, p. 14, col. 3 4

Matter of City of New York (Cohan-Bronx Terminal Market), 12 AD 2d 745 (1st Dept., 1961), *lv. den.* 9 NY 2d 612 (1961), *cert. den.* 366 U. S. 943 (1961) 7

Matter of City of New York (Court House), 216 N.Y. 489 (1916) 9

Matter of City of New York (Flatbush Ave. Extension), 167 App. Div. 908 (2nd Dept., 1915) 7

Roberts v. New York City, 295 U. S. 264 (1934) 10

PAGE

Constitutions:

Constitution of the United States, Fifth Amendment 12
Constitution of the State of New York, Art. I, Sec. 7 2, 11
Charter of United Nations 3
Charter of Organization of American States 3
United Nations Declaration of Human Rights, Art. 17, Sec. 2 10, 11

Statutes:

Administrative Code of the City of New York:
Chap. 15, Tit. B 3
Sec. B15-7.0 6
Sec. B15-24.0 7
Sec. B15-25.0 8
New York City Charter (1963), Sec. 382 6
New York Civ. Prac. Law and Rules, Sec. 5501, subd. 1 7
New York State Condemnation Law:
Sec. 4 2-3, 11
Sec. 27 3 fn.
28 U.S.C., Sec. 1257 8
28 U.S.C., Sec. 1441 2
42 U.S.C., Sec. 1465(b) 10

Other Authority:

Nichols, Eminent Domain (Third Ed. 1965), Vol. 6, §26.72, pp. 409-411 7

IN THE

Supreme Court of the United States

October Term, 1970

No. 475

MAX LIBEN, JACK LIBEN, NORMAN LIBEN, SELMA LEVINE, all doing business under the firm name and style of M. LIBEN TIRE CO.,

Petitioners,

against

THE CITY OF NEW YORK, LINCOLN AMSTERDAM URBAN RENEWAL AGENCY, and THE SUPREME COURT OF THE STATE OF NEW YORK,

Respondents.

BRIEF OF THE CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIORARI

Statement

Petitioners seek certiorari to review an order of the United States Court of Appeals for the Second Circuit, entered May 7, 1970, which affirmed a judgment of the District Court, Southern District of New York. The judgment of the District Court dismissed this action, which collaterally challenges the appropriation of petitioners' real property in an eminent domain proceeding brought in the Supreme Court of the State of New York.

Questions Presented

1. May final judgment in a local condemnation proceeding, prosecuted with due regularity, be collaterally challenged on newly raised grounds in an independent action brought by owners of one of the acquired damage parcels who did not oppose the application for condemnation, who did not appeal from the judgment, and who accepted a partial payment of the award?

2. Is the taking illegal or arbitrary because it works a hardship on the petitioners who must relocate or discontinue the business enterprise they conduct on the damage parcel taken in an eminent domain proceeding?

3. Is a taking by eminent domain invalid by reason of the United Nations' Declaration of Human Rights simply because it works a hardship on the owner of the property taken?

The District Court Action

The petition for certiorari describes this as an action to remove a condemnation proceeding in the state court to the United States District Court, pursuant to 28 U.S.C. Sec. 1441 (Pet., pp. 1-2).

Actually, as the face of the complaint shows, this is an action to nullify an order of condemnation made by the Supreme Court of the State of New York on the ground that the eminent domain provision of the New York constitution (Art. I, Sec. 7) and the New York Condemnation

Law, Section 4, are repugnant to the federal constitution, the United Nations Charter and the Charter of the Organization of American States. As ancillary relief, the complaint prays that all proceedings in the state court be stayed and that the condemnation proceeding be removed to the District Court (11-12).*

The State Condemnation Proceeding

The petitioners owned in partnership a parcel of real estate in the Borough of Manhattan where they conduct a business for the sale of automotive tires and related products (7-8, 13). The property, designated as Damage Parcel 7, was condemned as part of the site for the Lincoln-Amsterdam Urban Renewal Project, a federally-aided acquisition (7).

Local condemnation practice is governed by the City's Consolidated Condemnation Procedure (New York City Administrative Code, Chap. 15, Tit. B [2 Williams 1963 Ed. pp. 297 *et seq.*]. The statute provides, in part, for the vesting of title in the condemnor upon application made on notice; the filing of claims for damage; a trial of the damage claims; a hearing of objections on a tentative decree; the making and filing of a final decree; and a right to appeal from the final decree.**

---

* Unless otherwise stated, parenthetical references indicate pages of the appendix in the Court of Appeals.

** The petitioners seem to be unaware of the governing statute. The complaint challenges the Condemnation Law of the State of New York, a general statute (12). The Condemnation Law exempts the City of New York from its operation (Sec. 27).

The complaint does not allege that any of the required statutory procedures were not performed. So far as it refers to the prosecution of the condemnation proceeding, it indicates that the City's application to condemn was granted on May 1, 1967, and thereafter the Condemnation Court made a fee award of $514,000 for petitioners' damage parcel (par. 9, p. 7; par. 13, p. 8).

The City's brief in the Court of Appeals invited the Court to take judicial notice of the following other uncontroverted and material details of the condemnation proceeding. See *Consolidated Freightways* v. *Railroad Commission of California*, 36 F. Supp. 269, 271 [D.C., Calif., 1941]). The order of condemnation, as appears from its own recital, was granted without opposition (reported without detail. *In Re Lincoln-Amsterdam Urban Renewal Project*, N.Y.L.J.,* May 3, 1967, p. 20, col. 4 [Sup. Ct., N.Y. Co.]). The award to the petitioners was granted by a final decree made and entered on December 10, 1969, after a trial and a hearing of objections on the tentative decree. The Condemnation Court overruled all objections to the awards (N.Y.L.J., July 2, 1969, p. 12, col. 8; Nov. 7, 1969, p. 15, col. 5; Dec. 15, 1969, p. 14, col. 3). The preliminary recitals show compliance with all statutory requirements, from the granting of the order of condemnation to the overruling of objections to the awards. The petitioners did not appeal from the final decree.

When this action was commenced in the District Court, the Comptroller of the City of New York had not reached the petitioners' award for processing of payment. An ad-

* New York Law Journal.

vance partial payment of award, in the amount of $325,000, however, had been collected by the petitioners (9).

Pending the physical commencement of the urban renewal project, the petitioners were permitted to remain in possession of their former property as tenants at will of the project sponsor. This action was precipitated by the City's efforts, on behalf of the sponsor, to dispossess the petitioners. To this end the Condemnation Court granted an order of possession, in the nature of a writ of assistance, directing the Sheriff of the County of New York to deliver possession of the premises to the sponsor (Pet., pp. 3-4).

Execution of the order of possession has been successively deferred by agreement of the parties or order of the Condemnation Court. On June 1, 1970 the Condemnation Court granted a final stay of execution, peremptory against petitioners, until July 1, 1970. An appeal from that order taken by petitioner Jack Liben to the Appellate Division, First Department, of the Supreme Court of the State of New York on June 26, 1970, is now pending. Also pending is his motion to that Court, returnable August 21, 1970, for a stay of the order of possession pending prosecution and decision of that appeal and a companion appeal described in the following paragraph.

The companion appeal to the New York Appellate Division, First Department, was taken by petitioner Jack Liben on June 26, 1970, from an order of the Condemnation Court entered June 24, 1970. That order denied petitioner's application for the vacatur of the order by which petitioner's property was taken in condemnation.

POINT I

The issue having been determined by the final decree in the condemnation proceeding in the Supreme Court of the State of New York, petitioners, who failed to appeal therefrom, are estopped from challenging the validity of the appropriation of their property. They are estopped also by receipt of a partial payment of award, which constitutes an acceptance of benefits in the challenged proceeding.

(1)

The theory of the complaint in this action is that the appropriation of petitioners' property violated their rights, protected by the Constitution of the United States and certain of its treaties with international organizations. This issue could have been urged in the condemnation proceeding in the state court, but it was never raised there.

The application to condemn was made on notice published in the City Record, a published journal of the City of New York. It was supplemented by mailed notice to property owners, directed to addresses registered with the City Collector for the purpose of tax billing. New York City Charter, Sec. 382; Administrative Code, Sec. B15-7.0 (2 Williams 1963 Ed., p. 300). The petitioners did not oppose the application. Nor did they challenge the taking at any time before final judgment. On the contrary, represented by counsel, they participated in the valuation trial without protest against the validity of the appropriation, and they obtained a substantial award for their property.

This action seeks to litigate the very issue resolved by the order of condemnation, which order is recited in the

final decree of the Condemnation Court. The action is a collateral attack on the appropriation and is barred by the final decree. *Huling* v. *Kaw Valley Railway and Impr. Co.*, 130 U. S. 559, 564 (1889); 6 NICHOLS on *Eminent Domain* (Third Ed.), §26.72, pp. 409-411. This principle of estoppel by judgment is codified in the local condemnation statute, as follows (Administrative Code, §B15-24.0, subd. b [2 Williams 1963 Ed., p. 317]):

> "The final decree, unless set aside or reversed on appeal, shall be final and conclusive as well upon the city as upon the owners of the real property mentioned therein, and also upon all other persons whomsoever."

As noted, the petitioners did not appeal from the final decree. Ordinarily, the order of condemnation, itself not appealable, may be brought up for review on appeal from the final decree. *Matter of City of New York (Cohan-Bronx Terminal Market)*, 12 AD 2d 745 (1st Dept., 1961), lv. den. 9 NY 2d 612 (1961), cert. den. *sub nom. Cohan* v. *City of New York*, 366 U. S. 943 (1961); New York Civ. Prac. Law and Rules 5501, subd 1. In the premises, since the order of condemnation was granted without opposition, it would have been beyond the scope of review if an appeal had been taken from the final decree. *Matter of City of New York (Flatbush Ave. Extension)*, 167 App. Div. 908 (2nd Dept., 1915).

(2)

The vice of petitioners' collateral attack on the condemnation decree is particularly significant on this application for certiorari. If such maneuver is countenanced, they will have avoided the finality requirement of the

statute that limits this Court's review by certiorari of the judgment of a state court. 28 U.S.C. Sec. 1257.

Under local statute a decree in condemnation is appealable as of right to the Appellate Division of the New York Supreme Court. Administrative Code of the City of New York, Sec. B15-25.0 (2 Williams 1963 Ed., p. 317). As noted, petitioners failed to take such appeal, thereby waiving the right to apply to this Court for review of the proceedings in the state court.

Instead, on December 11, 1969, the day after the entry of the decree in condemnation, they filed their complaint in this action in the United States District Court (2). If their appeal in this collateral action is permitted to serve as a basis for a review by certiorari, petitioners will have accomplished by indirection that which they could not do directly.

It is noteworthy that one of the petitioners, Jack Liben, has been and still is seesawing between the federal and state court systems. After the United States Court of Appeals affirmed the order of the District Court on May 7, 1970, the petitioners did not immediately make the instant application. Instead, Jack Liben prosecuted unsuccessful motions in the Condemnation Court for a further stay of execution of the order of possession and for the vacatur of the order of condemnation, and then filed notices of appeal to the New York Appellate Division from the orders denying those motions (*ante*, p. 5).

Liben also made a motion in the Appellate Division, returnable August 21, 1970, for a further stay of the order of

possession and for an interim stay pending the decision of the motion. The latter application, heard in chambers on July 2, 1970, by Justice George Tilzer of the Appellate Division, was denied. Thereafter, on July 29, 1970, petitioners resumed proceedings in this action by service of the instant petition for certiorari.

Thus, at the present writing, one of the petitioners, a partner of the others, is litigating this controversy with the City in appellate courts of two judicial systems, having brought the matter before this Court in avoidance of the policy that permits review of the judgment of a state court only if it is final.

(3)

The petitioners received an advance partial payment of award in the amount of $325,000. This acceptance of benefits in the condemnation proceeding is a further bar to their attack on the acquisition. *In re Denney* v. *Fort Recovery Banking Co.*, 135 F. 2d 184, 186 (7th Cir., 1943), cert. den. 320 U. S. 747 (1943), rehear'g den., 320 U. S. 812; *Matter of City of New York* (*Court House*), 216 N.Y. 489, 494-495 (1916).

POINT II

The acquisition of the premises is not illegal or arbitrary because the petitioners must relocate or discontinue the business enterprise they conducted on the property. The United Nations' Declaration of Human Rights restates the due process requirement of the federal and state constitutions, which was observed in the challenged appropriation.

(1)

The core of petitioners' grievance is that, in view of the difficulty in finding a new place of business, they were arbitrarily deprived of their property in contravention of the Declaration of Human Rights (Pet., 4, 6).

The power of eminent domain is an inherent attribute of sovereignty. *Adirondack Railway* v. *New York State*, 176 U.S. 335, 349 (1899). The federal and state constitutions do not confer the power, but limit it by providing that property shall not be taken without due process of law or just compensation. These limitations are satisfied if the taking is for a public purpose and the property owner is afforded an appropriate hearing on the compensation issue before a properly constituted tribunal. *Roberts* v. *New York City*, 295 U.S. 264, 277-278 (1934).

Although the petitioners characterize the City's taking of their property as arbitrary, they make no challenge to the procedure of the taking or to the City's local condemnation statute. As noted, they mistakenly assume that the procedure is governed by a general statute, the Condemnation Law of the State of New York.

The sense of the petitioners' charge of arbitrary action is that their property should have been spared from condemnation because of difficulty in relocating their business. This is an argument that relates to the wisdom of including the property in the urban renewal site. That is a legislative matter, which is not justiciable. *Berman* v. *Parker*, 348 U.S. 26, 35 (1954). Every public acquisition works incidental hardship on owners of private property, residential as well as commercial. Relocation difficulties or loss of good will connected with the property owner's business are incidental to the appropriation and are not compensable. *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority*, 12 NY 2d 379, 391 (1963), app. dism. for want of a substantial federal question, 375 U.S. 78 (1963), rehear'g den. 375 U.S. 960 (1963). In recent years the burden of relocation has been eased by statutory allowances. 42 U. S. C. §1465(b).

The petitioners' reliance on Article 17, Section 2, of the United Nations' Declaration of Human Rights does not aid their case. It provides (Pet., p. 7):

> "No one shall be arbitrarily deprived of his property."

This restates domestic constitutional provisions that no person shall be deprived of property without due process of law.

The measure of the petitioners' misunderstanding of their rights is that they direct a constitutional challenge to Article I, Section 7, of the Constitution of the State of New York and Section 4 of its Condemnation Law. Their prayer for relief asks that these sections "be declared of

no effect" (12). The request is absurd. The former section which embodies the "just compensation" requirement, is a restatement of the Fifth Amendment of the federal constitution. The latter is a general statute, inapplicable to local condemnations (*ante*, fn., p. 3).

(2)

Petitioners' other contentions addressed to the merits are that the condemnation of their property serves the interest of local religious organizations and that funds are not available to redevelop the urban renewal site (Pet., p. 6).

The latter is a new argument, not pleaded in the complaint or urged in the court below. Respecting the former, the complaint alleges on "information and belief" that the premises were condemned at the behest of a Catholic priest and a rabbi concerned with housing facilities available for members of their congregations in the interest of maintaining a balanced community (10).

There is no indication, and petitioners do not allege, that aid to these particular congregations was the sole and exclusive purpose of the condemnation or that the apartments in the housing project, still to be erected, will be allocated on any denominational basis. At most, petitioners' allegation suggests that the condemning authority was motivated, in part, by the laudable considerations urged by two clergymen. In the circumstances, the issue of the ulterior motive of an acquisition, accomplished with due regularity, is not justiciable. See *Deerfield Park District* v. *Progress Development Corp.*, 26 Ill. 2d 296, 186 N.E. 2d 360, 361 (1962), cert. den. 372 U.S. 968 (1963).

CONCLUSION

The petition for a writ of certiorari should be denied.

August 17, 1970.

Respectfully submitted,

J. Lee Rankin,
Corporation Counsel of the
City of New York,
Attorney for Respondent
City of New York.

Stanley Buchsbaum,
Milton H. Harris,
of Counsel.